IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 253 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)

Versus

OCEANIC SHIPPING SERVICE OF M T SUHAIL - Respondent(s)

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Appearance :
MR TANVISH U. BHATT for Petitioner No(s).: 1.
NOTICE SERVED for Respondent No(s).: 1.
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CORAM :HON'BLE MR.JUSTICE D.A.MEHTA

HON'BLE MS.JUSTICE H.N.DEVANI

Date : 08/07/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1 The following question has been referred by the Income Tax Appellate Tribunal, Ahmedabad Bench 'B' under Section 256(1) of the Income Tax Act,1961 (the Act) at the instance of the Commissioner of Income-tax.

> *"Whether, the Appellate Tribunal is right in law in holding that the provisions of section 172 were not applicable and hence tax was not leviable under Section 172(2) in respect of U.S.$ 1,00,000/- received by the assessee for towing away a merchant vessel?"*

2 The Assessment Year is 1987-88 and the relevant accounting period is 31.3.1987. The assessee company was treated as an agent of M.T.Suhaili u/s.163 of the Act by the Assessing Officer. Thereafter, assessment u/s.143(3) read with Section 5(2)(b) of the Act came to be made at a total income of Rs.9,80,392/-.

3 It appears that one ship named M.V.Kranj which was

in the port of Navlakhi was required to be towed away by M.T.Suhaili, a powerful tug,(the Tug) from Navlakhi to Singapore/Japan. The owners of M.T.Suhaili who are non residents were approached by owners of M.V.Kranj for chartering the tug to tow away M.V.Kranj and an agreement was entered into for payment of towing charges of U.S.$ 1,00,000/- (one lac US.Dollars). It is not in dispute that M.V.Kranj, the merchant vessel came to the Indian port for discharging cargo and was not required to load any cargo at the port of discharge. While at the Indian port M.V.Kranj developed engine trouble and hence it had to be towed away. It is further not disputed that the agreement between the owners of the tug and the ship was made outside India and payment was also made outside India.

4 Initially the assessee approached the Assessing Officer seeking clarification as to whether any income tax clearance certificate was required for the purpose of towing operation. The Assessing Officer instead of replying to the query raised by the assessee called upon the assessee to furnish a return of income and pay income tax on the towing charges. The assessee resisted the said attempt, but after prolonged correspondence furnished the necessary details in terms of Section 172

of the Act and paid a sum of Rs.63,725/-, (Rupees Sixty three thousand seven hundred twenty five only) as tax under protest. The said amount was taxed on protective basis by the Assessing Officer since the assessee had offered the same, while maintaining that the assessee was liable to be taxed on a total income of Rs.9,80,392/- (Rupees Nine lac Eighty thousand Three hundred Ninety two only).

5 The assessee carried the matter in appeal before CIT (Appeals), Rajkot, who for the reasons stated in his order dated 20.1.1989 did not approve of the action of the Assessing Officer in taxing the assessee under section 5(2)(b) of the Act, but upheld the taxability u/s.172 of the Act.

6 The Department being aggrieved with the order of CIT (Appeals) in relation to the finding about non taxability u/s. 5(2)(b) of the Act preferred an appeal before the Tribunal. The assessee preferred Cross-Appeal against the part of the order of CIT (Appeals) whereby he had upheld assessee's liability to pay tax u/s. 172 of the Act. The Tribunal vide its order dated 5.3.1993 has dismissed the departmental appeal and allowed the assessee's appeal. In other words, the finding that the assessee is not liable to be taxed under section 5(2)(b)

of the Act has become final. In the present reference the revenue has challenged the finding of the Tribunal that no tax is leviable u/s.172 of the Act as the said section itself is not applicable in the facts and circumstances of the case.

7 Mr.Tanvish U.Bhatt, learned Standing Counsel appearing on behalf of the applicant-revenue has been heard. Though served there is no appearance on behalf of the respondent-assessee.

8 It was submitted by Mr.Bhatt that Section 172(1) of the Act requires carriage of passengers, live-stock, mail or goods by a ship which belongs to or is chartered by a non resident, and such cargo,i.e., passengers etc., is shipped at a port in India. That admittedly M.V.Kranj having been towed away from Navlakhi port by the Tug and the Tug being a ship, requisite conditions of goods being carried by a ship are fulfilled and the Tribunal was in error in giving a restricted meaning to the term 'goods'. That the word 'goods' means all moveable articles of whatsoever nature and thereby a ship which cannot sail on its own would be goods when it is towed away by another ship. He, therefore, urged that the Tribunal's order was required to be reversed and the

order made by CIT (Appeals) restored.

9 As controversy turns on interpretation of provisions of Section 172(1) of the Act it is necessary to reproduce the same for ready reference.

" Shipping business of non-resident.

> *172.(1) The provisions of this section shall, notwithstanding anything contained in the other provisions of this Act, apply for the purpose of the levy and recovery of tax in the case of any ship, belonging to or chartered by a non-resident, which carries passengers, livestock, mail or goods shipped at a port in India."*

10 The Section opens with a non-obstante clause and if the prescribed conditions are satisfied it would apply for the purpose of levy and recovery of tax in the case of any ship. The Section requires in the first instance that a ship should belong to or be chartered by a non-resident; secondly, the ship carries passengers, live-stock, mail or goods; and thirdly, such cargo of passengers etc., should be shipped at a port in India. In the facts of the present case admittedly the ship not only belongs to a non-resident but also is chartered by a non-resident and hence the first requirement stands satisfied. However, the difficulty arises in relation to fulfillment of condition nos. 2 and 3.

11 When a tug tows away a ship which cannot propel itself by its own force, is it possible to state that the tug carries 'goods'? The tug is admittedly a vessel in the wider meaning ascribed to a 'ship', but can it be stated that it carries goods ? Secondly, even if the ship which is towed away is treated as 'goods' considering the wide definition of a 'Ship', can it be stated that the 'goods' are shipped at a port in India? Therefore, the terms 'carries', 'goods' and 'shipped' shall have to be analysed in the context and purpose of the provision. The object of the provision is levy and recover tax in relation to shipping business of non-residents.

12 When one talks of carrying of passengers, live-stock, mail or goods in a ship can the concept of carrying be equated with towing? In this context word 'tow' as per plain dictionary meaning would mean 'to pull a car or boat behind another vehicle using a rope or chain'. This is the meaning ascribed to 'tow' when it is used as a verb. The word 'tow' when used as an idiom i.e. 'in tow' means in context of a ship 'if a ship is taken in tow, 'it is pulled by another ship'.

(Source: Oxford Advanced Learner's Dictionary, Sixth edition, [2000] This reference is also applicable hereinafter , except where a different source is specified.).

13 Therefore, applying plain meaning of the term 'tow' it becomes apparent that when a vessel is towed by another vessel it cannot be stated that the towing vessel 'carries' another vessel which is towed. Therefore, when a vessel does not carry other vessel, even if for the sake of argument the other vessel is termed to be 'goods', yet it cannot be stated that such goods are carried by a ship and therefore the condition of goods being carried by a ship is not satisfied.

14 The matter may be examined from a slightly different angle. The plain dictionary meaning of the term 'tug', when used as a verb, means 'to pull something hard'. When the term is used as noun it means, 'a small powerful boat for pulling the ships, especially into harbour or up-river'. Therefore, it cannot be stated that a tug, though a vessel/ship for a limited purpose, carries goods when it pulls a ship by way of tow. Therefore, on this ground also the condition of goods being carried cannot be stated to be satisfied.

15 The term 'goods' as used in the provision has to be understood in ordinary commercial parlance and usage i.e., the articles or things which can be bought and sold. A vessel which due to mechanical fault, that it has developed, cannot propel itself on its own, does not become 'goods' for the purpose of being carried by a ship for the purpose of trade. In fact it is an admitted position that M.V.Kranj was being towed away only because it had developed engine trouble and not for the purpose of being traded as 'goods'. This meaning, *namely*, that the goods should be meant for the purpose of trade becomes abundantly clear when the term 'shipped' following the term 'goods' is taken into consideration.

16 The term 'Shipped' is used in the past tense of the term 'Ship' as a verb, considering the setting in which it is used namely passengers, live-stock, mail or goods shipped at a port in India. The plain meaning of the term 'Ship' means 'to send or transport something by ship or by another means of transport', for example 'the company ships its goods all over the world'.

17 The connected terms 'ship-load' and 'shipment' may

also be examined. 'Ship-load' has been defined to mean 'as many goods or passengers as a ship can carry'; while 'shipment' has been defined as 'the process of sending goods from one place to another'. Shipment of the goods normally means putting the goods on board a ship. (Source : Butterworths Words and Phrases Legally Defined, Volume 4.). Therefore, if these terms are read in context of the phrase “shipped at a port in India”, it is plainly discernible that vessel/ship which is towed away cannot be treated as shipped at a port in India as it is not goods and further, goods have to be put aboard a ship.

18 The contention on behalf of the revenue that when a tug tows a ship it carries a ship and ship being a movable article, the tug carries the goods also requires to be rejected. As can be seen from Section 172(1) of the Act the provision stipulates a ship which carries passengers, live-stock, mail or goods. Therefore, the term 'goods' has to take colour from the preceding words /terms and one cannot visualize either passengers or live-stock or mail being towed away and they have to be carried by a ship aboard a ship. Thus, goods also have to be carried by ship aboard a ship.

19 In light of what is stated hereinbefore it is not possible to find any infirmity with the order of the Tribunal. Section 172(1) of the Act admittedly cannot be invoked by the revenue in the facts and circumstances of the case. There is no ship which carries any goods shipped at a port in India. None of the requirements of the Section are fulfilled. If Section 172(1) of the Act is not applicable there is no question of computing and levying tax in terms of sub-section (2) of Section 172 of the Act.

20 Accordingly the question referred to the Court is answered in affirmative i.e., in favour of the assessee and against the revenue. The Reference stands disposed of accordingly. There shall be no order as to costs.

(D.A.Mehta,J) (H.N.Devani,J)

m.m.bhatt.